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In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Respondent expressly abandons (Resp. Br. 8 n.2) the court of appeals' interpretation of Section 8(b)(1)(B) as prohibiting union discipline of supervisor-members for serving as grievance adjusters or collective bargainers for an employer disfavored by the union only when the union represents or has "demonstrated an intent to represent" (Pet. App. 6a) that employer.[1] Instead, respondent seeks

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[1] It is not surprising that the respondent abandons the court of appeals' interpretation. While the court of appeals asserted that the Union had not demonstrated an intent to represent the employees of the nonsignatory employers because it had not engaged in such conduct as "picketing, handbilling, making statements of interest to the employers, or passing out opposition cards" (Pet. App. 7a), the history of the ongoing controversy between the Union and electrical contractors in its geographic area, including Nutter and Royal, makes it clear that the Union's coercive action directed at Nutter and Royal was part of a campaign to represent all the employees of electrical contractors in its area. See Pet. App. 22a-26a, 33a, 34a; see also Brief of Amici Curiae National Electrical Contractors Association, et al. at 4-13. As noted in our opening brief (at 20 n.13), the court of appeals

to support the court's judgment with another, equally flawed, interpretation of Section 8(b)(1)(B).

1.a. As we have explained, the Board interprets Section 8(b)(1)(B) as proscribing union discipline of members for accepting supervisory positions with particular employers whom the union disfavors. Respondent contends (Br. 12) that the Board's interpretation would give the section a broader reach than Congress intended and would "transform that section into a vehicle requiring unions to remain open to workers who opt to become supervisors." Respondent therefore suggests that the Court interpret the section to proscribe "union discipline aimed at controlling the manner in which union members represent management," but not "union discipline aimed at preventing union members from accepting management positions" (*id.* at 8 n.2).

The distinction respondent proffers ignores the plain language of Section 8(b)(1)(B). That language cannot abide an interpretation that would, as respondent proposes, "safeguard the employer's control over his representatives, but would not preclude a union from seeking to prevent its members from becoming management's representatives" (Resp. Br. 16 (emphasis omitted)). The statute proscribes union coercion of an employer "in the *selection* of his representatives for the purposes of collective bargaining or the adjustment of grievances" (29 U.S.C.

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erred in not accepting the Board's findings in that regard. The Union does not deny that it had a dispute with Nutter and Royal (indeed, the Union proceeded against the employees under a provision of the Union constitution that prohibits members from working for an employer "whose position is adverse or detrimental to the [Union]" (J.A. 152)). The Union merely differs with the characterization of that dispute as recognitional, choosing to describe it as involving the employers' failure to adhere to area standards (Resp. Br. 3-4). There is no support for an interpretation of Section 8(b)(1)(B) that would make its application turn on the nature or level of intensity of the dispute between the union and the disfavored employer.

158(b)(1)(B) (emphasis added)). If the word "selection" has any meaning, it must accord the employer the right, free of union coercion, to *choose* his management representatives—and not merely the right to insure that a selected representative is thereafter free of union control.

b. In a further attempt to limit the reach of Section 8(b)(1)(B), respondent devotes much of its brief (Br. 18-31) to arguing that the provision was aimed narrowly at "two precisely defined evils" (*id.* at 18). But respondent's own submission (*id.* at 25-27) confirms that one of those evils was a union's attempt to coerce the selection or removal of an employer's grievance representatives. The Report of the Senate Labor Committee, quoted by respondent (*id.* at 25), explicitly states that "this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." S. Rep. 105, 80th Cong., 1st Sess. Pt. 1, at 21 (1947); see Gov't Br. 9-10.

c. For more than 20 years, the Board has recognized that an employer's freedom to select his grievance adjustment representatives may be taken away just as effectively by union discipline against a supervisor-member with grievance adjustment functions as by direct union pressure on the employer to remove a particular grievance adjuster. See *San Francisco-Oakland Mailers' Union No. 18,* 172 N.L.R.B. 2173 (1968) (*Oakland Mailers*).[2] Respondent does not directly challenge the rationale of *Oakland*

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[2] In *Oakland Mailers,* the union had fined supervisor-members for the manner in which they assigned work under an existing collective bargaining agreement between the union and the employer. The Board found that, although the union "sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the [employer] by indirect rather than direct means," realistically, the pressure required the employer either "to replace its foremen or face *de facto* nonrepresentation by them." 172 N.L.R.B. at 2173.

Mailers.[3] It urges, however, that while Section 8(b)(1)(B) may proscribe such indirect union interference "with an employer's control over its representatives" (Br. 35), the provision should not be construed to proscribe union discipline aimed at preventing union members from accepting supervisory positions in the first place.

That contention is simply another version of respondent's argument that, despite its plain language, Section 8(b)(1)(B) does not apply to the selection of management representatives. It is true that *Oakland Mailers* arose in a situation where the union sought to control how the supervisor-members exercised their collective bargaining or grievance adjustment functions, not to affect their willingness to work as supervisors for the disfavored employer (see n. 2, *supra*). But Section 8(b)(1)(B) in terms protects the employer's right to *select* grievance adjustment and collective bargaining representatives free of union coercion. *Oakland Mailers* prohibited disciplining supervisor-members for their *performance* because of the effect on employer *selection,* and the present case—in which the discipline restrains the employers' selection altogether—is in this respect *a fortiori* to that one.

2.a. Respondent argues that Section 8(b)(1)(B) should be interpreted to prohibit only direct union pressure on the employer to block the selection, or compel the removal, of grievance adjustment and collective bargaining representatives, and not indirect union pressure that has or may have the same effect. Respondent's contention is contrary to the decisions of this Court, which specify that the focus of analysis under Section 8(b)(1)(B) is the potential impact of union conduct on employers. *Florida Power & Light Co.*

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[3] Unlike amicus curiae AFL-CIO, which calls for a reexamination of the validity of *Oakland Mailers* (AFL-CIO Br. 4, 21-24), respondent does not "urge the Court to revisit that decision here" (Resp. Br. 34). Instead, respondent contends that "the theory the Board propounds in the instant case represents yet a further extension of *Oakland Mailers,* one not compelled by the decisions to this point" (*ibid.*).

v. *IBEW, Local 641,* 417 U.S. 790, 804-805 (1974); *American Broadcasting Cos.* v. *Writers Guild,* 437 U.S. 411, 424 (1978).

In *Florida Power,* the Court said that "[b]oth the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the *selection* of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." 417 U.S. at 803 (emphasis added). And the Court assumed the validity of the Board's position in *Oakland Mailers* that Section 8(b)(1)(B) interdicts not only a union's direct economic pressure on an employer to replace its chosen collective bargaining or grievance adjustment representative, but also "a union's discipline of one of its members who is a supervisory employer * * * when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 417 U.S. at 804-805. Despite respondent's suggestion to the contrary, all that the *Florida Power* Court found to be beyond the "metes and bounds" (*id.* at 798) of Section 8(b)(1)(B) was the Board's attempt in that case to prohibit union discipline of supervisor-members who had been fined for crossing picket lines *not* to engage in collective bargaining and grievance handling but to perform the rank-and-file work of striking employees.[4]

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[4] Amicus curiae AFL-CIO asserts (AFL-CIO Br. 9 & n. 2) that in *Florida Power* this Court rejected the reasoning of *Oakland Mailers.* But, as we have shown, in *Florida Power* the Court did not disapprove the proscription of indirect pressure, it disapproved only the Board's conclusion that Section 8(b)(1)(B) extends beyond protecting the collective bargaining and grievance adjusting functions specified in the section. Significantly, when this Court had occasion to describe *Florida Power* in *ABC,* the Court stated (437 U.S. at 425):

> Assuming without deciding that the Board's decision in *Oakland Mailers* fell within the outer reaches of Section 8(b)(1)(B), the Court concluded that [the Board decision in *Florida Power*] did

The reason why the Court rejected the Board's position in *Florida Power* has no bearing on the issue in this case. The Board's position in *Florida Power* was predicated on its concern that discipline of supervisor-members even for performing rank-and-file work would "deprive the employer of the full loyalty of those supervisors" (417 U.S. at 806). But the Court held that the problem of divided loyalty "is one that Congress addressed, not through § 8(b)(1)(B), but through a completely different legislative route," *i.e.,* by excluding supervisors "from the coverage of the Act" and thereby giving the employer "the right to refuse to hire union members as supervisors." 417 U.S. at 807-808 (footnote and citations omitted). In the present case, the Board is not attempting to insure the employer the undivided loyalty of his supervisors, but the right freely to select his representatives for grievance adjustment purposes—a right that *Florida Power* recognizes is clearly within the purview of Section 8(b)(1)(B).

In *ABC,* the Court again "declined the invitation to overrule *Oakland Mailers"* and reaffirmed that "Union pressure on supervisors can affect either their willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative." 437 U.S. at 436 (footnote omitted). The Court upheld the Board's finding that the union's discipline of supervisor-members performing their normal

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not, because it was 'certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.'

The Court added (437 U.S. at 429) that in *Florida Power* it had "expressly refrained from questioning * * * the proposition that an employer could be coerced or restrained within the meaning of Section 8(b)(1)(B) not only by picketing or other direct actions aimed at him but also by debilitatfng discipline imposed on his collective-bargaining or grievance adjustment representative."

supervisory duties (including grievance adjustment) during a strike had both of these impermissible effects.

b. Respondent concedes (Br. 15) that the reference in *ABC* to a supervisor's "willingness to serve" can be read to support the Board's position that union discipline of supervisor-members for serving as supervisors of a disfavored employer can violate Section 8(b)(1)(B). Respondent seeks to distinguish *ABC*, however, by asserting (Br. 15) that in that case the union had permitted its members to serve as management representatives and was seeking to use its continuing power over those members to regulate their conduct as management representatives. Respondent contends that union discipline affecting "willingness to serve" is unlawful only "where a union 'interfere[s] with the employer's control over his representatives' by disciplining individuals for their conduct *qua* management representatives" and *thereby* affects the union members' willingness to serve as grievance adjustors or collective bargainers (*id.* at 16).

There is, however, no indication that the Court intended its language in *ABC* to have the restricted meaning respondent suggests. To the contrary, as our opening brief explained (at 13), the Court cited with approval the Board's decision in *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*, 177 N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972), a case in which the union fined a supervisor-member with grievance handling functions because he worked for an employer that did not have a contract with the union. It is therefore clear that the Court viewed Section 8(b)(1)(B) as proscribing union discipline that deprives a disfavored employer of its chosen representatives even where that discipline is not part of an attempt to control the performance of the representatives. Indeed, the Court indicated that union discipline for the express purpose of causing the employer's chosen representatives for grievance adjustment or collective bargaining to be unwilling to serve in that capacity

at all—the situation in *Horner* and here—" 'falls close to the original rationale of Section 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing.' " *ABC*, 437 U.S. at 436 n. 36 (quoting *IBEW, Local 134* v. *NLRB*, 487 F.2d 1143, 1155 n.19 (D.C. Cir. 1973)).[5]

3. Just as there is no merit to respondent's effort to engraft novel limitations onto the statute, respondent is also incorrect in contending that the Board espouses an unbounded interpretation of Section 8(b)(1)(B). The Board's interpretation, would not, as respondent asserts (Br. 8), "prohibit all union conduct which affects the size of the pool from which an employer chooses his supervisors" nor does the Board propose to "make it unlawful for a union to limit its membership to rank-and-file workers and to exclude *all* supervisors from union membership (regardless of where the supervisor works)" (*id.* at 11). To the contrary, in *National Association of Letter Carriers*, 240 N.L.R.B. 519 (1979), the Board held that the union did not violate Section 8(b)(1)(B) by amending its constitution to render employees who accepted positions as temporary supervisors ineligible for membership so long as they worked in that capacity, even though the union's action caused "the pool of letter carriers available to serve as temporary supervisors [to be] diminished" (240 N.L.R.B. at 525). The Board explained that "[t]he fact that the Postal Service may have fewer letter carriers who are willing to serve as temporary supervisors as a result of the [union constitutional] amendment in no way affects the Postal Service's selection of *which* letter carrier will serve as a temporary supervisor (*ibid.* (emphasis in original)).

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[5] There is no merit to respondent's suggestion (Br. 15 n.9) that the Court's opinion in *ABC* should not be read as approving *Horner*. Respondent's view rests on the mistaken belief that in *ABC* the Court regarded Section 8(b)(1)(B) as restricted to proscribing union interference with employer *control* over management representatives.

In *Letter Carriers,* the Board expressly distinguished the cases that respondent claims (Br. 17) are in conflict with that case. In those cases,[6] the Board found violative of Section 8(b)(1)(B) union fines imposed on members who accepted or retained temporary supervisory positions when the union was disputing the employer's right to utilize temporary supervisors. In those cases, as here, the unions had no general rule against members serving as supervisors, but instead used their disciplinary power over members to further a dispute with a particular employer. As the Board explained in *Letter Carriers,* 240 N.L.R.B. at 525 & n.28, in those cases the unions attempted to "influence [the employers' supervisory] selection procedure" by prohibiting their members from accepting such positions, whereas in *Letter Carriers* the "decision to appoint an employee as a temporary supervisor, and the final decision to accept such an appointment, remains solely within the power of the Postal Service and the employee, respectively."

The Board's position that a union may violate Section 8(b)(1)(B) when it uses its disciplinary power over its members to affect an employer's selection of its representatives for grievance adjustment or collective bargaining does not mean that a union that believes it detrimental to its interests to have supervisors as members cannot promulgate a rule barring all supervisors from union membership. As the Board explained in a different context, in the latter situation, "[t]he primary relationship * * * affected [is] the one between the union and its members * * * and the union's particular objective * * * [is] deemed * * * a legitimate area for union concern * * *." *Oakland Mailers,* 172 N.L.R.B. at 2174. On the

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[6] *Teamsters Local 663*, 193 N.L.R.B. 581 (1971); *Communications Workers, Local 1122*, 226 N.L.R.B. 97 (1976), enforced, 562 F.2d 37 (2d Cir. 1977) (Table); *Systems Council T-6*, 236 N.L.R.B. 1209 (1978), enforced, 599 F.2d 5 (1st Cir. 1979).

other hand, where, as here, the union seeks to prevent a member from working as a grievance adjustor or collective bargainer for a particular employer, "the relationship primarily affected is the one between the Union and the Employer * * * " and "[t]he relationship between the Union and its members [is] only of secondary importance, used as a convenient and * * * powerful tool to affect the employer-union relationship." *Ibid.*

For these reasons, as well as those set forth in the Board's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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